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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM SILVA,

Petitioner,

vs.

JAY RAM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RESPONDENT STATE OF HAWAII'S BRIEF

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In *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151 (1995), the Court held that a government officer's "evidence sufficiency" challenge to the denial of summary judgment in a qualified immunity case is not appealable. The Court of Appeals in the present case viewed Silva's appeal as presenting such a challenge. *Ram v. Rubin*, 118 F.3d 1306, 1311 (9th Cir. 1997), Petition Appendix ("App.") at 10.

The Court in *Johnson*, however, does not appear to have decided that a government officer cannot challenge the district court's denial of summary judgment on the ground that the assumptions it made about what information the officer pos-

sessed at the time the officer acted, *see Anderson v. Creighton*, 483 U.S. 635, 641 (1987), were not supported by the summary judgment record. *See Johnson v. Jones*, 515 U.S. at ____, 115 S.Ct. at 2159. *See also Behrens v. Pelletier*, 516 U.S. ____, 116 S.Ct. 834, 842 (1996).

Such a challenge would not appear to compromise the collateral order doctrine. In discussing appealability under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court noted that *Mitchell v. Forsyth*, 472 U.S. 511 (1985), "rested upon the view that 'a claim of immunity is conceptually distinct from the merits of plaintiff's claim,' " even though it was "sometimes practically intertwined with the merits. . . ." 515 U.S. at ____, 115 S.Ct. at 2157. A government officer's challenge of the district court's legal question on the ground that it wasn't supported by the summary judgment record would not seem to undermine the conceptual distinctiveness of the district court's question.

Here, the District Court would have granted Petitioner's motion for summary judgment had Respondent Ram's evidence not suggested that Petitioner might have known the children were not in immediate danger and that Petitioner may have taken the children into custody because of political pressure and not concern for the safety of the children. App. at 32-33. *See* App. at 23-24. Thus, Petitioner was entitled to argue to the Court of Appeals that the summary judgment record before the District Court did not contain substantial evidence supporting the facts assumed by the District Court other than that the Petitioner knew about the Respondent's indictment and therefore that Petitioner was entitled to summary judgment.

The State of Hawaii is of the opinion that the Petition for Certiorari to this Court fairly includes such argument. The

State of Hawaii takes no position on whether the Petition should be granted.

Respectfully submitted

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